

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

C.L.E.A.N., INC., APPELLANT

vs.

DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

DOCKET NUMBER WD75561

Date: August 13, 2013

Appeal from:

The Labor and Industrial Relations Commission

Appellate Judges:

Special Division: Joseph M. Ellis, P.J., Gary D. Witt, J. and Robert Clayton, III, Sp. J.

Attorneys:

Gretchen E. Gaynor, for Appellant

Bart A. Matanic, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

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Labor and Industrial Relations

Before Special Division Judges: Joseph M. Ellis, P.J., Gary D. Witt, J. and Robert Clayton, III, Special Judge

C.L.E.A.N. LLC is a limited liability company owned and operated by its sole member, Robin Wittenborn. C.L.E.A.N. is a residential cleaning service that engages workers to provide cleaning services in the homes of its clients. Wittenborn performs the initial cleaning of a potential customer's home and gives the potential customer an estimate. She then calls a worker and asks if the worker wants to be assigned to the new client's home. Workers can accept or decline the assignment. If the worker accepts, Wittenborn provides the worker with a cleaning checklist that details the client's preferences and how the client's home is to be cleaned. The worker is responsible for scheduling cleanings with the client. However, workers are required to relay all scheduled and rescheduled cleanings to Wittenborn.

To ensure its workers have the proper cleaning equipment and supplies, C.L.E.A.N. offers to lease its workers the necessary equipment, materials, and supplies for \$10.00 a week. The \$10.00 rental fee is non-negotiable and is deducted from the worker's weekly pay. C.L.E.A.N. does not keep inventory of how much product or supplies a worker uses in a week.

Upon completing work in a client's home, C.L.E.A.N. workers leave C.L.E.A.N. business cards that contain C.L.E.A.N.'s contact information. C.L.E.A.N. clients make their checks payable to C.L.E.A.N., and all payments workers receive from C.L.E.A.N. clients are to be handed over to Wittenborn. Workers are paid a 40% commission for each home they clean and a 10% performance bonus based upon the totals reflected on their weekly statements. C.L.E.A.N. requires workers to invoice the homes they clean on a specific form and submit it to C.L.E.A.N. at the end of every week. C.L.E.A.N. instructs its workers how to fill out and calculate the form.

Workers can terminate their relationship with C.L.E.A.N. at any time by providing written or oral notice to the company. All agreements between C.L.E.A.N. and the worker become null and void after twenty-four hours of notification being given

In 2008, the Division of Employment Security ("the Division") conducted an investigation into C.L.E.A.N.'s failure to pay unemployment security taxes. The Division determined that twenty-seven of C.L.E.A.N.'s workers performed services for wages in employment. The Division's decision was affirmed by the Appeals Tribunal. The Labor and Industrial Relations Commission ("the Commission") reversed the Appeals Tribunal's decision as to one worker but agreed that the remaining twenty-six of C.L.E.A.N.'s workers performed services for wages in employment and, thus, were not independent contractors.

C.L.E.A.N. now appeals from the Commission's decision. It contends the Commission's decision is erroneous because its workers are independent contractors, not employees, and because it was denied fair proceedings in front of the Appeals Tribunal.

AFFIRMED.

Special Division holds:

(1) The Commission did not err in concluding that 26 of C.L.E.A.N.'s workers performed services for wages in employment and, thus, were not independent contractors, because the overwhelming weight of the evidence indicates that C.L.E.A.N. retained a sufficient right to control its workers despite the fact that the workers could accept or decline assignments and were responsible for scheduling their cleanings with clients in that the record reflects that Wittenborn would perform the initial cleanings at potential customers' homes, provide the customers with estimates, and provide the assigned worker with checklists that gave instruction as to how that client's home was to be cleaned. Further evidence established that Wittenborn trained C.L.E.A.N. workers prior to sending them out to clean homes independently and workers were required to inform Wittenborn of any changes in the client's preferences or scheduled cleanings. Thus, because C.L.E.A.N. maintained an ample amount of control over its workers' schedules and the services its workers provided, the Commission's decision that the twenty-six C.L.E.A.N. workers were employees and not independent contractors is not against the weight of the evidence.

(2) The Commission did not err in concluding that 26 of C.L.E.A.N.'s workers performed services for wages in employment and, thus, were not independent contractors, because the fact that a worker organizes herself as an LLC because C.L.E.A.N. demanded that she do so does not magically make that worker an independent contractor. Rather, it is whether that worker is an independent contractor in fact based on application of the common law of agency. Accordingly, given the circumstances of this case, the fact that some of C.L.E.A.N.'s workers had organized their own LLC cleaning businesses is not indicative of independent contractor status.

(3) C.L.E.A.N. was not denied a fair proceeding before the Appeals Tribunal in that the Referee's comment that her goal is to "get the most valuable information as quickly as possible" does not reflect any bias toward C.L.E.A.N. or reflect her opinion as to the merits of the case. Rather, when read in context, the comment merely reflects the Referee's preferences regarding the order of the Division's witnesses at the hearing. Accordingly, C.L.E.A.N. failed to overcome the presumption that the Referee was honest and impartial.

(4) We cannot say that C.L.E.A.N. was denied a fair proceeding on the basis that the Referee sustained several objections made by the Division because the record reflects that that the Referee was considerate of the fact that Wittenborn was acting *pro se* on C.L.E.A.N.'s behalf and allowed Wittenborn sufficient latitude throughout the proceedings. C.L.E.A.N. also failed to provide any legal explanation or discussion as to why the Referee erred in sustaining the Division's objections. Accordingly, C.L.E.A.N. failed to establish that it was denied a fair proceeding before the Appeals Tribunal.

Opinion by: Joseph M. Ellis, Judge

Date: August 13, 2013

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